No. 91-1518

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LILLIE E. PARKER, ET AL., PETITIONERS

v.

GWENDOLYN KING, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction under 28 U.S.C. 1292(c)(1) and 28 U.S.C. 1295(a)(2) over an interlocutory appeal in a suit for overtime pay and damages brought by federal employees against the United States under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), on the ground that the Little Tucker Act, 28 U.S.C. 1346(a)(2), provides the basis for jurisdiction in the district court.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-8a, is reported at 935 F.2d 1174. The opinion of the district court, Pet. App. 10a-17a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1991. A petition for rehearing was denied on November 12, 1991. On January 23, 1992, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 23, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners[1] filed this suit in the United States District Court for the Northern District of Georgia in 1987, seeking overtime pay and liquidated damages for alleged violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Pet. App. 2a. None of their individual claims exceeded $10,000. Pet. App. 3a n.1. The complaint asserted jurisdiction pursuant to the so-called Little Tucker Act, 28 U.S.C. 1346(a)(2),[2] and 28 U.S.C. 1331. Pet. App. 2a, 11a. Respondents moved to dismiss, or in the alternative, to transfer the action to the United States Claims Court on two grounds: (1) venue was improper as to those petitioners who did not reside within the Northern District of Georgia, and (2) the Civil Service Reform Act of 1978, 5 U.S.C. 7121, deprived the district court of subject matter jurisdiction over the claims of all petitioners. Pet. App. 11a.

The district court held that the Tucker Act's venue provision, 28 U.S.C. 1402(a)(1), controlled the venue issue and that this provision afforded venue only to

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[1] Petitioners are the four employees of the Social Security Administration who filed the suit, on behalf of themselves and other similarly situated employees; a fifth named employee who joined the suit by amended complaint; and approximately 1300 others from across the country who filed consents to opt in as party plaintiffs pursuant to 29 U.S.C. 216(b). Pet. App. 2a.

[2] Under the Tucker Act, the Claims Court has exclusive jurisdiction over claims against the United States for more than $10,000 "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491. Under 28 U.S.C. 1346(a)(2) (the Little Tucker Act), district courts have concurrent jurisdiction with the Claims Court over such claims when the amount sought is less than $10,000.

the plaintiffs who reside in the district. Pet. App. 13a, 15a. Relying on 28 U.S.C. 1406(a), the district court decided to transfer the claims of the nonresident plaintiffs to the Claims Court. Pet. App. 15a. The district court then considered whether it had jurisdiction over the resident plaintiffs' claims. Based on the parties' representations that *Carter* v. *Gibbs*, a case then on appeal to the United States Court of Appeals for the Federal Circuit, would be dispositive of the jurisdictional issues presented, the district court stayed the case pending the Federal Circuit's decision. Pet. App. 16a.[3] Thereafter, before transferring any claims, the district court granted petitioners' unopposed request for interlocutory certification of the court's venue order. Pet. App. 4a. Over respondents' objection,[4] the Eleventh Circuit granted interlocutory review pursuant to 28 U.S.C. 1292(b). Pet. App. 4a.

2. Within days of the oral argument in the interlocutory appeal, the Federal Circuit issued its en banc decision in *Carter* v. *Gibbs*, 909 F.2d 1452, cert. denied, 111 S. Ct. 46 (1990), which held that the Civil Service Reform Act deprived district courts of subject-matter jurisdiction over the FLSA claims of federal employees, at least when those employees are covered by collective bargaining agreements that permit them to grieve and arbitrate FLSA violations. Pet. App. 4a.

After allowing supplemental briefing and additional oral argument, the Eleventh Circuit issued an opinion

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[3] The court did, however, give resident plaintiffs the option of transferring their claims to the Claims Court. Pet. App. 16a.

[4] Respondents argued that the Federal Circuit would have appellate jurisdiction of the matter under 28 U.S.C. 1292(c)(1) and 28 U.S.C. 1295(a)(2).

directing that the appeal be transferred to the Federal Circuit because the district court's jurisdiction rested on the Little Tucker Act.[5] Pet. App. 8a. The Eleventh Circuit concluded that *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), did not overturn prior authority establishing the Tucker Act as the exclusive jurisdictional basis for FLSA claims against the government. Pet. App. 6a. Accordingly, "[s]ince we have resolved that the district court's jurisdiction over these claims derives solely from the Little Tucker Act, the Federal Circuit must hear this appeal." Pet. App. 8a. Although the Eleventh Circuit acknowledged that in light of *Carter*, "the Federal Circuit may have already determined the consequences of this appeal," it recognized that "that Circuit remains free to decide these issues, including the issue of venue, in the manner it deems appropriate." Pet. App. 8a.

ARGUMENT

1. The present posture of this case makes review at this time inappropriate, for several reasons. First, there is no reason for this Court to vary from its "normal practice of denying interlocutory review," see *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting), in this peculiar case. Presently, this case is doubly interlocutory: the Court is being asked to review an interlocutory transfer order of an interlocutory venue appeal. Transfer orders are almost universally viewed as interlocutory. See *Persyn* v. *United States*, 935 F.2d 69, 72-73 (5th Cir. 1991);

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[5] Under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive appellate jurisdiction if the jurisdiction of the district court was based "in whole or in part" on the Little Tucker Act. According to 28 U.S.C. 1292(c)(1), interlocutory appeals in such cases must also be taken to the Federal Circuit.

Alimenta (USA), Inc. v. *Lyng*, 872 F.2d 382, 384-385 (11th Cir. 1989); *Raines* v. *Block*, 798 F.2d 377, 379 (10th Cir. 1986). The Eleventh Circuit's transfer order neither conclusively determines the jurisdictional issue nor is effectively unreviewable at a later time. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The Federal Circuit may review the transfer order, and if that court finds the transfer to have been "clearly wrong," it may decline to accept jurisdiction. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). In any event, the jurisdictional question will still be available for review by this Court after the entry of a final judgment. *Id.* at 817-818.[6]

Second, the case is potentially moot as to some—and perhaps all—of the petitioners. While this litigation was pending, the American Federation of Government Employees (AFGE) and the Social Security Administration of the Department of Health and Human Services went to arbitration over grievances filed by the union on behalf of Claims Examiners/Representatives, GS-105-9 and 10, and Claims Authorizers, GS-933-9 and 10, to protest the agency's decision to exempt those employees from coverage under the FLSA. The arbitrator ruled that the agency had illegally designated the grievants as exempt from coverage under the FLSA as bona fide

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[6] Moreover, there has been no appellate ruling on the venue issue, which is the question that gave rise to the interlocutory appeal. The Eleventh Circuit's transfer order expressly leaves that issue open, stating that the Federal Circuit "remains free to decide these issues, including the issue of venue, in the manner it deems appropriate." Pet. App. 8a. Although the Eleventh Circuit accepted the discretionary interlocutory appeal under 28 U.S.C. 1292(b), there is no assurance that the Federal Circuit will agree to hear the venue issue.

administrative employees and ordered the agency to treat the grievants as nonexempt from FLSA coverage and to pay them backpay for overtime pay to which they were entitled. The agency filed objections to the arbitrator's decision, which the Federal Labor Relations Authority denied in a decision dated April 14, 1992. See *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees*, 44 F.L.R.A. No. 66 (Apr. 14, 1992). Accordingly, as to those class members who are members of the AFGE bargaining unit and who participated in the grievance arbitration, the case would appear to be moot. Should the agency decide to extend the decision to the class members who are not covered by any collective bargaining agreement or who are covered by an agreement with another union, the case could then be moot as to those class members as well. The obvious potential for having this case become moot counsels strongly against this Court granting certiorari at this interlocutory stage.

2. The transfer order is correct. Petitioners brought suit seeking overtime pay and liquidated damages; they specifically pled the Little Tucker Act, 28 U.S.C. 1346(a)(2), as one of the bases for jurisdiction in the district court; and the district court's venue ruling was clearly premised on Tucker Act jurisdiction. Pet. App. 12a. Accordingly, the Federal Circuit would have exclusive jurisdiction over any interlocutory (or final) appeal taken in this case. 28 U.S.C. 1292(c)(1); 28 U.S.C. 1295(a)(2); *United States* v. *Hohri*, 482 U.S. 64 (1987). The Eleventh Circuit's decision to transfer the appeal to the Federal Circuit was therefore proper.

3. There is no conflict among the circuits on the question presented. The Eleventh Circuit's refusal

to find that the FLSA and 28 U.S.C. 1331 provided an alternative basis for district court jurisdiction over whatever claims for judicial relief petitioners might have, is consistent with the decisions of the other courts of appeals that have considered this question under the FLSA. See *Zumerling* v. *Devine*, 769 F.2d 745 (Fed. Cir. 1985); *Graham* v. *Henegar*, 640 F.2d 732 (5th Cir. 1981).

Contrary to petitioners' claim, Pet. 7, the Eleventh Circuit's decision is not inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, this Court held that the district courts, not the Claims Court, have jurisdiction to review a final order denying a claim for reimbursement under the Medicaid program. In so ruling, the Court observed in a footnote that the Claims Court's jurisdiction under the Tucker Act is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910 n.48. The Eleventh Circuit explicitly acknowledged that aspect of *Bowen*, Pet. App. 5a-6a, but nevertheless concluded that the grant of subject matter jurisdiction in the FLSA must be read together with the Tucker Act. That ruling does not conflict with this Court's holding in *Bowen*.

The Eleventh Circuit was correct in noting that the Tucker Act is the more specific statute in this case, even though petitioners term it a "catch-all," Pet. 6, statute for damages claims against the government. The FLSA does provide a cause of action for a covered federal employee to sue his federal employer, but only in a court of "competent" jurisdiction. 29 U.S.C. 216(b).[7] For private employees

[7] Section 216(b) of Title 29 provides in pertinent part that "[a]n action to recover the liability prescribed in either of the

and state or local employees, who are also given a cause of action under that statute, there is only one federal court of competent jurisdiction in which they may sue their employer: the district court. But when the federal government is sued for backpay and damages, the federal court of competent jurisdiction can only be one exercising Tucker Act jurisdiction (*i.e.*, the Claims Court and, for claims less than $10,000, the district courts) because those claims are cognizable only under that scheme unless another statute has directed them elsewhere. *Mitchell* v. *United States*, 930 F.2d 893 (Fed. Cir. 1991).

Petitioners have identified no case holding that FLSA claims are cognizable against the government in district courts under any statute other than the Little Tucker Act. Nonetheless, petitioners argue that the transfer order in this case conflicts with the decisions of other courts of appeals interpreting the sue-and-be-sued clause in the National Housing Act, 12 U.S.C. 1702. Pet. 8-11.[8] That argument overlooks

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preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

[8] The majority of petitioners' cases involve 12 U.S.C. 1702. Some of the cases cited by petitioners, however, involve other statutes, including 16 U.S.C. 839f(e)(5) and 15 U.S.C. 634(b)(1). Those statutes, while not identical to 12 U.S.C. 1702, are plainly dissimilar to the statute at issue here. For instance, 16 U.S.C. 839f(e)(5) provides in part that "[s]uits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator * * * shall be filed in the United States court of appeals for the region." 15 U.S.C. 634(b)(1) provides in pertinent part that "the Administrator may (1) sue and be sued in any court of record of a State having general jurisdiction, or in

fundamental differences between 12 U.S.C. 1702 and 29 U.S.C. 216(b).

The former is a classic sue-and-be-sued clause. It provides in part that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal." While that language is similar to that of Section 216(b), there is a key difference. The purpose of a sue-and-be-sued clause is to authorize suit against a particular agency with regard to its commercial activities. Any recovery is from funds that are in that agency's control, which are separate from the funds in the general treasury. *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940); *Far West Federal Bank, S.B.* v. *Director, Office of Thrift Supervision*, 930 F.2d 883, 888-890 (Fed. Cir. 1991). See, *e.g.*, *C.H. Sanders Co.* v. *BHAP Housing Dev. Fund Co.*, 903 F.2d 114, 118-120 (2d Cir. 1990); *Industrial Indem., Inc.* v. *Landrieu*, 615 F.2d 644, 646-647 (5th Cir. 1980). When the claim, instead, is one that would be paid from appropriated funds, the Tucker Act controls the question of jurisdiction, despite the presence of a "sue-and-be-sued" clause. *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126, 1131-1132 (9th Cir. 1979) (Tucker Act provides jurisdiction despite sue-and-be-sued clause because there were no severed funds from which payment could be made); see *Cosme Nieves* v. *Deshler*, 786 F.2d 445, 447-450 (1st Cir.), cert. denied, 479 U.S. 824 (1986) (FLSA claim against a so-called non-appropriated fund instrumentality of the federal government may be maintained in district court,

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any United States district court, and jurisdiction is conferred upon such district court without regard to the amount in controversy."

since, unlike the situation in this case, no funds from the treasury would be reached by the judgment).[9]

4. Finally, there is no merit to petitioners' suggestion, Pet. 12, that the Court should grant review in this case because the Federal Circuit's en banc decision in *Carter* v. *Gibbs*, *supra*, undermines the FLSA's enforcement scheme and conflicts with *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). As we explained in our brief in opposition in that case (a copy has been provided to petitioners' counsel), the federal Circuit's decision in *Carter* v. *Gibbs* was correct. This Court therefore properly declined to review it. Nothing has changed since then that warrants any different treatment of this petition.[10]

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[9] We recognize that a pending case, *American National Red Cross* v. *S.G & A.E.*, No. 91-594 (argued Mar. 3, 1992), presents the question whether 36 U.S.C. 2, which provides that the American National Red Cross shall have the "power to sue and be sued in courts of law and equity, State or Federal," vests the federal courts with original jurisdiction over actions to which the American National Red Cross is a party. Yet, there is no need to hold this case pending the Court's decision in *American National Red Cross*. If this Court's decision in *Red Cross* proves informative on the questions presented in this case, the Federal Circuit will have the opportunity to consider it.

[10] Even if the Court were inclined to revisit the issue presented in *Carter* v. *Gibbs*, however, this case does not now present the proper vehicle for doing so. Neither court below ruled on the issue whether petitioners' claims are barred by *Carter* v. *Gibbs*. As noted above, the district court stayed its decision on the dismissal motion concerning the resident plaintiffs pending the Federal Circuit's decision in *Carter* v. *Gibbs*, and that stay has never been lifted. Furthermore, although the Eleventh Circuit requested supplemental briefing and oral argument on the *Carter* v. *Gibbs* issue, its order does not address the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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